No. 11982

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; FIREMAN'S FUND INSURANCE COMPANY, a Corporation; and E. F. SMITH,

Appellees.

Reply Brief of Appellee, Jim Dandy Markets, Inc. to Opening Brief of Appellants, Central Manufacturers' Mutual Insurance Company, and Indiana Lumbermen's Mutual Insurance Company.

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A.
Statement of the Case.

A statement of the case appears in the Reply Brief of Appellee Jim Dandy Markets, Inc. to Appellant Smith's Opening Brief, and therefore no further statement will be made herein. The attention of the Court is, however, directed to the fact that none of the parties hereto, and particularly none of the Appellants, have contended, or now contend, that there is no liability to Appellee Jim Dandy Markets, Inc. under the policies of fire insurance issued by the Appellants Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company.

Hereafter, Jim Dandy Markets, a partnership, and its successor, Jim Dandy Markets, Inc., will be referred to as "Jim Dandy."

ARGUMENT.

POINT I.

Jim Dandy Was Purchasing the "Atlantic Store," Including the Building Thereon, Under a Conditional Sales Contract, and Was Therefore the Sole and Unconditional Owner of the Building at the Time It was Destroyed by Fire.

Each of plaintiffs' policies issued to Jim Dandy under the paragraph "Matters avoiding policy" provide that the policy shall be void if the interest of the insured be other than unconditional and sole ownership. To one who is unacquainted with the decisions of the Courts of California construing said provision, it would appear that a purchaser under a conditional sales contract who has not yet obtained title is not the sole and unconditional owner, and therefore cannot recover under the policy. Fortunately for Jim Dandy, such is not the law in the State of California.

An examination of the "SUPPLEMENTARY AND MODIFIED AGREEMENT" and of the "ESCROW INSTRUCTIONS" will show, beyond a peradventure of a doubt, that Jim Dandy did not have an "option" to purchase from Smith, but was under a definite and unqualified obligation to pay Smith $225,000.00 without any alternative, and Smith, in consideration of that agreement, agreed to assign, and did assign, all interest that he had in the Leases, including the Lease covering the "ATLANTIC STORE." Under such circumstances the Courts have held that the Conditional Vendee is the sole and unconditional owner of the prop-

erty, and in the event of the destruction of the building by fire, the vendee can recover on the policy.

In the case of *McCollough v. Home Ins. Co.,* 155 Cal. 659, 661, 102 Pac. 814, the Court said:

> "On July 31, 1905, the defendant issued to plaintiff a policy of fire insurance in the sum of three thousand dollars. Of this amount two thousand dollars was on a frame building, and one thousand on household furniture and effects contained therein. The building and contents were destroyed by fire, and this action was brought on the policy. The plaintiff had judgment for $2,650, with interest and costs, and defendant appeals from the judgment and from an order denying its motion for a new trial. The appellant bases its position upon two clauses of the policy, one relating to the title of the insured, and the other to the furnishing by him of sworn proofs of loss within a certain time.
>
> 1. The policy provided that it should 'be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by insured in fee simple.' The court found, following the allegations of the complaint, that before the policy was issued, the plaintiff fully stated and disclosed to the defendant and its agents, the nature and character of his interest in said land, *i. e.* that he held the land under a contract of purchase, was paying for the same upon installments, and did not yet have a deed, and found, further, that at all times since the issuance of the policy, the plaintiff had been the sole and exclusive owner of the building and the land, 'except as aforesaid.' These findings, in so far as they import either a compliance with the terms of the policy

or a waiver of a breach, are attacked as unsupported by the evidence.

The facts shown in connection with plaintiff's interest in the property were these: On April 22, 1904, Golden State Realty Investment Company, a corporation, was the owner of the land, described as Lots 62 and 63 in the Watts Junction tract. On that day it issued to plaintiff two papers, similar in form, referring to Lots 62 and 63 respectively. Each acknowledged the receipt from plaintiff of three dollars, 'as a deposit to secure' the lot described, and went on to state that the deposit was accepted as rent of said property for one week, that plaintiff was to pay the further sum of $1.50 as weekly rent for 97 weeks, and that upon payment of said sums, and the further sum of $1.50, the Golden State Company would convey the property, free and clear of encumbrance, to plaintiff. The contracts contained a provision for forfeiture in the event of a default in payment for four weeks. At the date of the issuance of the policy, July 31, 1905, the plaintiff had made fifty-six weekly payments on each of the contracts. Subsequently the remaining payments were made and the property conveyed to plaintiff. The building on the land was erected by plaintiff and was occupied by him.

The papers issued by the Golden State Company bore the designation 'Lease Contract.' Notwithstanding this, and the further fact that the weekly payments were described as 'rent,' there can be no doubt that the instruments were in fact not leases, but contracts of sale. (Parks etc. Co. v. White River L. Co., 101 Cal. 37 (35 Pac. 443); Parke etc. Co. v. White River L. Co., 110 Cal. 658 (43 Pac. 202); Holt Mfg. Co. v. Ewing, 109 Cal. 353 (42 Pac. 435).)

The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership, or the subject be a building on ground not owned by the insured in fee simple is designed to remove from him the temptation to profit by the willful destruction of property not entirely owned by him. (Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460 (2 Am. St. Rep. 686, 12 Atl. 668).) 'It therefore follows that the clause is in most cases held to refer to the character and quality of the title —to the actual and substantial ownership, rather than to the strictly legal title.' (2 Cooley on Insurance, 1369.) An equitable title in the insured is a sufficient compliance with the condition in question. A vendee in possession of property under a valid contract of purchase which he is entitled to enforce specifically, is the holder of such equitable title. (*Id.* 1376.) And the great weight of authority supports the proposition that such vendee is the 'sole and unconditional owner,' within the meaning of the policy, even though a portion of the purchase price may yet remain unpaid. (*Id.* Pennsylvania F. I. Co. v. Hughes, 108 Fed. 497 (47 C. C. A. 459); Phenix Ins. Co. v. Kerr, 129 Fed. 723 (64 C. C. A. 251); Loventhal v. Home Ins. Co., 112 Ala. 108 (57 Am. St. Rep. 17, 20 South 419); Dupreau v. Hibernia Ins. Co., 76 Mich. 615, 43 N. W. 585; Pelton v. Westchester F. I. Co., 13 Hun. 23, Affirmed 77 N. Y. 605; Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460 (2 Am. St. Rep. 686, 12 Atl. 668); Franklin F. I. Co. v. Crockett, 7 Lea, 725; Johannes v. Standard Fire Office, 70 Wis. 196 (5 Am. St. Rep. 159, 35 N. W. 298).) This doctrine would not apply to the case of one in possession of land under a mere option, which does not bind him to make the payments or to complete the purchase. (Phenix Ins. Co. v. Kerr,

129 Fed. 723 (64 C. C. A. 251).) Here, however, while the instruments executed by the Golden State Company were not signed by the plaintiff, they referred to and incorporated a prior application signed by him, and we think the contract and application, read together, did amount to an agreement, on McCullough's part, to purchase and pay for the property.

Under the facts shown there was, therefore, no breach of the condition of ownership, and there is no occasion to consider whether the evidence supports the finding of a waiver of the supposed breach."

In *Lee v. U. S. Fire Ins. Co.,* 55 Cal. App. 391, 394, 203 Pac. 774, the Court said:

"The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership . . . is designed to remove from him the temptation to profit by the wilful destruction of property not entirely owned by him . . . 'It therefore follows that the clause is in most cases held to refer to the character and quality of the title to the actual and substantial ownership, rather than to the strictly legal title' . . . An equitable title in the insured is a sufficient compliance with the condition in question."

See also:

Savage v. Norwich Union Fire Ins. Soc., 125 Cal. App. 330, 336, 13 P. 2d 955;

Brickell v. Atlas Assurance Co. Ltd., 10 Cal. App. 17, 101 Pac. 16;

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 308, 197 Pac. 99;

Calfee v. Home Insurance Co., 91 Fed. Rep. 2d 553;

Ramirez v. United Firemen's Ins. Co., 46 Cal. App. 451, 189 Pac. 309.

POINT II.

A Purchaser Under a Conditional Sales Contract Who Has Not Acquired Title Has an Insurable Interest in the Property Purchased, and the Risk of Loss Is Upon the Purchaser.

It is unquestionably the law in California that a purchaser, under a conditional sales contract, whether the property purchased is real or personal property, has an insurable interest in the property purchased, and the risk of loss is upon the purchaser. Appellee Jim Dandy admits, in fact it has never contended otherwise, that the building destroyed by fire was personal property, and that said building could not be considered real property unless the owner of the building, at the expiration of the Lease, failed, neglected, or refused to exercise the right to remove the building.

In 1931 the "Uniform Sales Act" was enacted in California, and under Section 1742 of the Civil Code, the risk of loss of the goods sold, even though title had not passed to the Vendee, is upon the Vendee. Said section reads as follows:

> "Risk of Loss. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:
>
> (a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(b) Where delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

In *Beaudry v. Peterson,* 50 Cal. App. 2d 478, 480, 123 P. 2d 108, an action was brought to recover the sum of $4,000.00 balance due on the purchase price of some machinery sold by the plaintiff to the defendant under a conditional sales contract. The property sold was, prior to the payment of the full purchase price, and prior to the passage of title, totally destroyed by fire. An action having been brought for the purchase price, the vendee contended that he was not liable because title had not passed to him and the property had been destroyed by fire. The Court said:

"It is clear to us that the judgment is fully supported by the findings. The agreement was a conditional sales contract and the title was reserved in the plaintiff even though the contract does not so provide expressly. (Katz v. People's Finance, etc. Co., 101 Cal. App. 552 (281 Pac. 1097); Bailly v. Loock, 103 Cal. App. 220 (284 Pac. 235).) In the event of default the seller had the option to repossess the property or to sue for the purchase price. (Johnson v. Kaeser, 196 Cal. 686 (239 Pac. 324); Smith v. Miller, 5 Cal. App. (2d) 564 (43 Pac. (2d) 347).) (2) His right to bring such an action was not defeated by the destruction of the property, for it is now the law in this state, as it has been for years in the great majority of other jurisdictions (24 R. C. L. 494; 2a Uniform Laws Annotated, 196), that one who contracts to buy personal property by an agree-

ment of this nature and takes possession of it assumes the risk of loss. This is provided unequivocally in Section 1742 of the Civil Code (copied above).

Up to the time of the adoption of the Uniform Sales Act by the California Legislature in 1931 (Stats. 1931, p. 2234; Civ. Code., Sec. 1721 ff), it was the law of this state that the risk of loss followed the title to goods even though possession had been transferred under a conditional sales contract. (Kirtley v. Perham, 176 Cal. 333 (168 Pac. 351); Potts Drug Co. v. Benedict, 156 Cal. 322, 334 (104 Pac. 432, 25 L. R. A. (N. S.) 609); Ross v. McDougal, 12 Cal. App. (2d) 172 (55 Pac. (2d) 574); Cocores v. Assimopoulos, 4 Cal. (2d) 82 (47 Pac. (2d) 699).) Holding that this was the established rule in California, the Court said in Kirtley v. Perham, *supra:*

> 'It is a well-settled proposition that an agreement of sale may transfer the right of possession to the vendee without transferring to him the title. Such was the effect of this agreement. The case, therefore, comes within the rule stated in Potts v. Benedict, 156 Cal. 334 (25 L. R. A. (N. S.) 609, 104 Pac. 432), that upon an executory agreement of sale, where title is retained in the vendor, although possession is given to the buyer, the loss entailed by the destruction or extinction of the subject matter, without fault by either party, falls upon the vendor, and that he cannot recover any balance of the purchase price remaining unpaid, and is liable to the buyer for the repayment of the portions of the price previously paid.'

It is obvious that the enactment of Section 1742 of the Civil Code made this rule entirely obsolete and

transferred the liability for loss from the seller to the purchaser under a conditional sales contract. In Kelly v. Smith, 218 Cal. 543 (24 Pac. (2d) 471), it is said that the case of Kirtley v. Perham, *supra,* 'is no longer of any authority for the reason that the rule was changed by legislative enactment in 1931 . . . It will be observed that this legislative enactment is in keeping with the extensive use of the so-called conditional sales contract and the great expansion of credit which has accompanied it. The same reasons which prompt the application of the majority rule respecting risk of loss in California to personal property ought to be given consideration when considering the loss of improvements to real property. Besides bearing in mind the great development of trade through the medium of such contracts with reservations of title as security we ought to consider upon whose shoulders devolves the responsibility of so caring for the property that fire will not occur, and how improper care will contribute to the hazard thereof.'

The risk of loss should be borne by the purchaser because he is the one who has the use of the property and is in a better position to protect it. The record discloses that the defendant purchaser caused the quartz mill, including property described in the contract, to be insured and that he filed a proof of loss after the fire in which he made a claim for damages to at least a portion of the property. The record does not show how much, if anything, he collected from the insurer as compensation. This is immaterial in our view of the case, but these facts indicate that he recognized the legal obligation imposed by the contract to protect himself against loss."

POINT III.

Insurance Company Presumed to Have Insured Such Interest as Insured Had at the Time the Policy Was Issued, in the Absence of Fraud on the Part of the Insured.

It is not contended by either Central Manufacturers' Mutual Insurance Company or Indiana Lumbermen's Mutual Insurance Company (Jim Dandy's insurance carriers), that Jim Dandy did not have an insurable interest in the building at the time the policies were issued to Jim Dandy, nor is there any pleading, evidence or contention that Jim Dandy misrepresented to its insurance carriers the nature or extent of its interest in the property insured. Under such circumstances, it is the law in California that it is presumed an insurance company insured such interest as the insured had in the property insured.

In *Sam Wong v. Stuyvesant Ins. Co.,* 100 Cal. App. 109, 112, 279 Pac. 1050, the Court said:

> "Moreover defendant is in no position to set up as a defense lack of ownership or that the insured did not own the ground on which the building was situate, as it waived objection to the form of the policy and is estopped from denying liability thereunder by issuing the policy and accepting the premiums therefor without any written application having been made by the insured, and also without any discussion having been had relative to either title to the buildings or the title to the property on which the same was situate. Plaintiff herein, as owner, had an insurable in-

terest in the building, he being in possession and operating the same as a dryer. (14 Cal. Jur. p. 465; 14 R. C. L. 915.) Prior to the adoption of the standard form of policy in this state it was held that where the assured had an insurable interest in property, and without fraud, in good faith applied for insurance upon the same, and made no actual misrepresentation or concealment of his interest therein, and the insurance company made no inquiry concerning his interest, and issued a policy to him, and accepted and retained the premium, the company must have been presumed to have knowledge of the condition of the title, and to have assured the property with such knowledge. (Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213-228 (107 Pac. 292); 14 R. C. L., pp. 926-932.) After the adoption of the standard form of policy, the law of waiver and estoppel remained the same as before upon this subject. (Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 315 (197 Pac. 99); 14 R. C. L., p. 932.)

It follows that the court below rightfully determined that defendant had waived the provisions in question contained in the policy."

See also:

Raulet v. Northwestern Ins. Co., 157 Cal. 213, 107 Pac. 292;

Sharp v. Scottish Union etc. Co., 136 Cal. 542, 69 Pac. 253;

Golden Gate Motor Transport Co. v. Great American Indemnity Co., 6 Cal. 2d 439, 58 P. 2d 374;

Dunne v. Phoenix Ins. Co., 113 Cal. App. 256, 298 Pac. 49.

POINT IV.

Apportionment Clause in Policies Issued by Plaintiffs to Jim Dandy Is Not Applicable.

Each policy issued by plaintiffs (Jim Dandy's insurers) expressly permits other insurance, and each policy contains an apportionment clause reading as follows:

> "APPORTIONMENT CLAUSE: This company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, whether valid or not and whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether valid or not and whether collectible or not, covering in any manner such loss; furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to such unit specifically insured, as the value of such unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not."

The plaintiffs, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, contend that their liability should be apportioned with the Fireman's Fund policy issued to E. F. Smith. There is no basis in logic or in law for such contention. The apportionment clause above quoted is only

applicable to insurance upon "the same interest" and is only applicable if Jim Dandy is insured by two or more companies, and is not applicable if a stranger to Jim Dandy's interest takes out insurance upon the same building, without its knowledge or consent.

The mere statement of the proposition shows the fallacy of the contention of the plaintiff insurance companies, because such a contention, if followed to its natural conclusion, would require an apportionment, if the writer of this brief insured his home for $50,000.00, and the Clerk of this Court likewise obtained $50,000.00 worth of insurance upon my home, then even though the Clerk of this Court could not recover on his policies and they are void, and I actually sustained a $50,000.00 loss, I could only recover $25,000.00.

It is settled law in this state that the apportionment clause is not applicable to the case at bar.

In *Mosee v. Fireman's Ins. Co.,* 87 Cal. App. 473, 262 Pac. 436, the Court said:

> "The appeal involves the question whether the defendant is liable for the full amount of a loss or for the proportion thereof which the amount of its policy bears to the total amount of insurance on the property insured.
>
> The facts are as follows: On November 7, 1912, the plaintiff executed to Charles Mettler, a promissory note for $1,225, payable three years after date, and to secure the payment thereof executed to Los Angeles Title and Trust Co. a deed of trust to certain real property upon which a dwellinghouse was situated. The trust deed authorized the trustee and the beneficiary thereunder to maintain insurance upon the dwelling house to the satisfaction of either of

them at the expense of the plaintiff. At the time the trust deed was executed, a policy of insurance upon the dwelling was issued to the plaintiff by defendant, insuring him against loss or damage by fire, the loss, if any, being made payable to Mettler, who then selected the defendant as a company satisfactory to him. On February 20, 1913, this policy expired and the defendant, at the request of the plaintiff, issued and delivered to him the policy involved in this action, which was for $1,300.00 and covered the same property. The latter policy insured the interest of the plaintiff, the loss or damage, according to a mortgagee clause or rider attached, being made payable to Mettler, who, however, refused to accept the policy as being satisfactory. On February 21, 1913, Mettler, without the knowledge or consent of the plaintiff, procured from the Queen Insurance Company a policy upon the same property for $1,250.00, which also insured the plaintiff, the loss or damage being payable to Mettler. The plaintiff in turn refused to accept the policy issued by the Queen Insurance Company or to pay the premium thereon, of which facts the latter company was notified; whereupon it requested Mettler to retain the policy, and agreed to recognize liability to him alone to the extent of his interest in the property insured. The plaintiff and Mettler each retained the policy procured by him, and on October 20, 1913, a fire occurred which damaged the property to the extent of $825.00.

In the body of the policy issued by the defendant appears the following clause: 'This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expenses of removal from the premises endangered by fire than the amount hereby insured bears to

the entire insurance covering such property whether valid or not or by solvent or insolvent insurers,' and the mortgage clause or rider attached provided as follows: 'In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having insurable interest therein whether as owner, mortgagee or otherwise.'

It is contended by defendant that the clauses quoted limited its liability to a proportionate part of the loss, namely, $420.55; and that the conclusion of the trial court that plaintiff was entitled under the policy to a judgment for the full amount of the loss was erroneous.

(1) According to the agreement between Queen Insurance Co. and Mettler, the insurance issued to the latter was limited to his interest in the property; and it being the rule that the interest created by a mortgage or deed of trust in the nature of a mortgage is an insurable interest distinct from that of the mortgagor or grantor (Civ. Code, Sec. 2546; 26 Cor. Jur., Fire Insurance, Sec. 11, pp. 29, 30; Davis v. Phoenix Ins. Co., 111 Cal. 409 (43 Pac. 1115); Loring v. Dutchess Ins. Co., 1 Cal. App. 186, 188 (81 Pac. 1025)), as is held in the following cases, separate insurance procured thereon is not other insurance requiring an apportionment of the loss upon

a claim by the owner on a policy insuring his interest, as the clause first quoted above has no application to insurance obtained upon another distinct insurable interest in the property; Commercial etc. Assur. Co. v. Scammon, 144 Ill. 506 (32 N. E. 916); Traders Ins. Co. v. Pacaud, 150 Ill. 245 (41 Am. St. Rep. 355, 37 N. E. 460); Home Ins. Co. v. Koob, 113 Ky. 360 (101 Am. St. Rep. 354, 58 L. R. A. 58, 68 S. W. 453); Hardy v. Lancashire Ins. Co., 166 Mass. 210 (55 Am. St. Rep. 395, 33 L. R. A. 241, 44 N. E. 209); Tuck v. Hartford Fire Ins. Co., 56 N. H. 326; Eddy v. London Assur. Corp., 143 N. Y. 311 (25 L. R. A. 686, 38 N. E. 307); Smith v. American Ins. Co., 177 Mich. 123 (143 N. W. 54); Dietzel v. Patrons Mutual etc. Co., 232 Mich. 415 (205 N. W. 149)."

See also:

Home Ins. Co. v. Koob, 58 L. R. A. 58, 113 Ky. 360, 68 S. W. 453;

Traders' Insurance Co. v. Pacaud, 37 N. E. 460, 150 Ill. 245;

Lubetsky v. Standard Fire Ins. Co., 187 N. W. 260, 217 Mich. 654;

Smith v. American Ins. Co., 143 N. W. 54, 177 Mich. 123;

Dietzel v. Patrons Mut. Fire Ins. Co., 205 N. W. 149, 232 Mich. 415.

POINT V.

Contention of Appellant Insurance Companies That Jim Dandy Markets, Inc. Is Entitled to Benefit of Insurance Collectible by Appellee E. F. Smith From Fireman's Fund.

Under Points No. II and III commencing on page 15 of the brief of appellant insurance companies, it is contended that Jim Dandy is entitled to the benefit of any insurance collectible by Smith from the Fireman's Fund Insurance Co., and that therefore there should be apportionment, not by virtue of the contract, but upon some other theory not readily understandable to the undersigned.

On page 17 of Appellants' Brief, appellants state that they "do not contend that the loss should be apportioned by virtue of the pro rata clauses of the respective policies."

At the time of the trial of this case the writer was not unmindful of the cases cited by appellants under said Points II and III. I did not urge that Jim Dandy was entitled to the proceeds of any monies collected by Smith from Fireman's Fund because I did not feel, and do not now feel, that the loss is apportionable between the plaintiff insurance companies on the one hand, and the Fireman's Fund on the other. Additionally, I was convinced that there was no liability on the part of the Fireman's Fund to Smith for the following reasons:

(a) Smith sustained no loss by virtue of the destruction of the building by fire.

(b) Smith's policy was void, because the interest of Smith as of the date of the destruction of the building by fire was other than unconditional and sole ownership.

(c) The policy issued by Fireman's Fund to Smith was suspended and therefore the Fireman's Fund was not liable because the interest in, and title to, the insured property was changed, particularly in view of the fact that Fireman's Fund did not give its consent in writing within sixty days next following the date of such change of interest or title.

Neither my clients nor I would be averse to a holding by this Court that there was liability, not only upon the policies issued by the plaintiffs, but likewise by the Fireman's Fund Insurance Co., and that the loss should be apportioned and all paid to Jim Dandy Markets, Inc., because Jim Dandy would benefit by such a holding. It is admitted that the cash value of the building destroyed by fire is the sum of $32,476.92, and Jim Dandy could then recover that amount instead of $25,000.00, but the undersigned, notwithstanding the fact that Jim Dandy would be the beneficiary of such a ruling, has not urged the proposition because I am not convinced that the proposition has merit, and I feel that I would be violating my duty as an officer of this Court if I urged a point that I believed had no merit.

Conclusion.

It is therefore respectfully submitted that Jim Dandy Markets, Inc., at the time of the destruction of the building by fire, was the sole and unconditional owner of the building, and that the judgment herein should be affirmed.

Respectfully submitted,

HARRY G. SADICOFF,

Attorney for Appellee, Jim Dandy Markets, Inc.